STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 265239 Wayne Circuit Court
JOSEPH DEEB ZARKA, Defendant-Appellant.	LC No. 04-011396-01

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of two counts of possession of a controlled substance (benzphetamine and Vicodin), MCL 333.7403(2)(b)(ii); three counts of possession intent to deliver a controlled (codeine, Vicodin, and LSD), MCL 333.7401(2)(b)(ii); one count of intent to deliver less than 50 grams of a narcotic (oxycodone), MCL 333.7401(2)(a)(v); three counts of possession of less than 25 grams of a narcotic (Ritalin, cocaine, psilocin [mushrooms]), MCL 333.7403(2)(a)(v); one count of possession of 3,4-methylenedioxymethamphetamine (Ecstasy), MCL 333.7403(2)(b)(i); one count of possession with intent to deliver Ecstasy, MCL 333.7401(2)(b)(i); one count of possession of 5 kilograms of marijuana, MCL 333.7401(2)(d)(iii); one count of operating or maintaining a drug house, MCL 333.7405(1)(d) and MCL 333.7406; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. This case arises out of the April 25, 2004 police raid of the residence at 20058 Cornell in Brownstown Township.[1] We affirm.

Defendant first claims that there was insufficient evidence to support his convictions because the prosecution failed to prove beyond a reasonable doubt that defendant possessed the controlled substances and firearms. We disagree.

We review sufficiency of evidence claims de novo. "Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). However,

[1] Defendant's sentences are not at issue on appeal.

> appellate courts are not juries, and even when reviewing the sufficiency of the evidence [we] must not interfere with the jury's role:
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> [An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) (citation omitted).

We find that the evidence in this case supports the jury's finding of guilt on the charges of drug possession.

> Proof of possession of a controlled substance requires a showing of dominion or right of control over the drug with knowledge of its presence and character. Possession may be either actual or constructive, and may be joint or exclusive. However, the defendant's mere presence where the controlled substance was found is not sufficient to establish possession; rather, an additional connection between the defendant and the controlled substance must be established. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance. Possession may be proved by circumstantial evidence and reasonable inferences drawn from this evidence. *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005) (internal citations omitted).

Here, a police officer testified that defendant, on two occasions, verbally claimed that the drugs found at the house were his.[2] Defendant argues that this evidence was improper hearsay. However, as these admissions are defendant's own statements, they fall under MRE 801(d)(2)(A), and are not hearsay by definition. The record also indicates that defendant had on his person a key to the house where the drugs were found, and that there was mail addressed to defendant in that house. In addition, defendant was in possession of a vehicle in which two plastic bags of marijuana were found.

The felony-firearm statute, MCL 750.227b, provides, in part, that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony .

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[2] Defendant asserts that the only evidence supporting his conviction was improper hearsay. However, defendant does not specifically identify what testimony was hearsay. He does reference testimony related to statements defendant made to an officer while being transported in the police van. However, these statements fall under MRE 801(d)(2)(A), and are not hearsay by definition. Defendant also cites testimony by another officer that the police did not fingerprint prescription bottles found in the house because of defendant's admission of guilt. This testimony came in response to a question posed on cross-examination. Even if impermissible, admission of this single statement cannot form the basis of reversal because of defendant's contribution, either by negligence or design, to its admission. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

. . is guilty of a felony . . .." "It is possession, not use, of a firearm during the commission of a felony that satisfies the requirements of the statute." *People v Beard*, 171 Mich App 538, 546; 431 NW2d 232 (1988).

The jury was instructed that it could consider each count of felony-firearm with respect to all other felonies in issue, except for possession of marijuana in the car and maintaining a drug house. The verdict form does not specify which underlying felonies the jury relied on to support the felony-firearm guilty verdicts. However, we find there was sufficient evidence to support defendant's felony-firearm convictions with respect to any of the drug possession charges here.

When a defendant is charged with felony-firearm, and the underlying felony is drug possession, the Court can consider the proximity of the firearm to the drugs when determining whether constructive possession of the firearm was simultaneous with the drug possession. *People v Burgenmeyer*, 461 Mich 431, 440; 606 NW2d 645 (2000). Here, drugs and drug paraphernalia were found throughout the house. Defendant's possession of these drugs was established through his own admissions to the police. Two firearms were found in the house, one on a closet shelf and the other lying in a hallway; they were sufficiently close to the drugs that the jury could determine that defendant possessed both simultaneously with the drugs. *Id*.

Next, defendant claims that the trial court erred in admitting evidence of prior, uncharged crimes. This assertion of error is based on the testimony of two police officers regarding prior contact they had with defendant. Specifically, one officer testified that he "had seen [defendant] many times through the course of my career." When the other officer was asked if he already knew defendant prior to the search in issue, the officer replied, "Yes." As this issue was not preserved by objection at trial, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b). In this case, neither officer ever mentioned any other crimes, wrongs, or acts. A review of the trial transcript reveals that the questions were asked merely to establish that the officers could identify the defendant as the individual they were arresting. It is apparent that the statements were not offered as evidence of defendant's bad character. The trial court did not err in the admission of this testimony.

Finally, defendant claims that he should receive a new trial because his trial counsel was ineffective.[3] Specifically, defendant argues that counsel should have challenged the validity of

[3] To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant by depriving him of a fair trial. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). The defendant must show the existence of a reasonable probability that, but for counsel's allegedly deficient performance, the result of the proceeding would have been different. *LeBlanc*, *supra* at 579; *Pickens*, *supra* at 314. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

the search warrant because it was not signed or dated. We have obtained a copy of the warrant from the prosecutor's office, and note that it is signed and dated.

We further note that during the preliminary examination, defense counsel questioned Sergeant Erik Krawczyk, the affiant who obtained the search warrant, about the signature and date on the warrant. Krawczyk testified that the warrant was properly signed by Judge Mark Somers, and dated April 25, 2004. At trial, the warrant was admitted into evidence, with no indication from the judge or defense counsel that there was any problem with the signature or the date on the document offered by the prosecutor at that time.

Defendant further argues that his counsel was ineffective for not pursuing an issue of a discrepancy in the dates between the warrant and the warrant return: the warrant was dated April 25, 2004 and the warrant return was dated April 24, 2004. We note that defense counsel asked about the discrepancy during the preliminary hearing. The officer testified that a clerical error was most likely to blame for the discrepancy.

Although the error on the warrant return gives us pause, because the search warrant was properly signed and dated, we cannot say that counsel was ineffective for failing to further pursue the issue of the discrepancy between the warrant and the warrant return.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter